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In The
Supreme Court of the United States
October Term

No. 87-1831

COOK COUNTY COLLEGE TEACHERS UNION LOCAL 1600, AFT, AFL-CIO,
Petitioner,

vs.

CITY COLLEGES OF CHICAGO, BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT # 508,
Defendant-Respondent,

and

HARVEY KARLEN, ARNOLD KUHN and LORETTA CARSELLO,
Plaintiffs-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE SEVENTH CIRCUIT

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Respondents, Harvey Karlen, Arnold Kuhn and Loretta Carsello, plaintiffs below, file this brief in opposition to the petition for writ of certiorari of Cook County College Teachers Union Local 1600, AFT, AFL-CIO.[1]

[1] City Colleges of Chicago, another defendant in this case, has chosen not to seek review of the Seventh Circuit opinion in this Court.

PRELIMINARY STATEMENT

The petitioner, Cook County College Teachers Union, Local 1600, AFT, AFL-CIO, seeks review of two issues in its petition for certiorari: (1) whether an early retirement program available to employees over 55 years old which cuts off benefits at age 65 is subject to § 4(a)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1), and, if so, (2) whether an employer satisfies a defense under § 4(f)(2) of the ADEA by claiming only that the purpose of the Early Retirement Program is to save money by encouraging retirement of older employees earning high salaries.

Plaintiffs claimed in this lawsuit that the Early Retirement Program of City Colleges of Chicago (City Colleges) discriminated on its face against faculty members over 65 years old in two ways. First, for all those who retired between the ages of 55 and 65, City Colleges agreed to pay the premiums for health, life, dental, vision, homeowners and automobile insurance. To those above age 65, all paid insurance benefits were eliminated.

Second, City Colleges agreed to pay a lump sum distribution to those employees over 55 who took early retirement. That lump sum payment was based on a percentage of sick time accumulated by the employee up to the date of retirement. The percentage rate used to determine the amount of the lump sum payment abruptly declined at age 65. For an employee between ages 55 and 58, City Colleges paid 50% of the employee's accumulated sick time. At age 59, the percentage increased to 60%. Between ages 60 and 65, the percentage increased to 80%. At age 65, however, the percentage dropped to 45% and remained at that level through age 70. The 45% paid to those over age 65 was the same as that paid to employees who were forcibly retired at age 70 (under then-existing law).

Section § 4(a)(1) of the ADEA makes it illegal for an employer to "discriminate against any individual with

respect to his compensation, terms, conditions or privileges of employment because of such individual's age." The District Court and the Court of Appeals both found that the Early Retirement Program (ERP) on its face discriminated against those over age 65 by eliminating insurance benefits and drastically reducing the lump sum payment to those over 65 years old.

Once a *prima facie* case under § 4(a)(1) is made, an employer may defend by claiming that the program is a *bona fide* retirement plan under § 4(f)(2) of the ADEA. This section allows age-based distinctions in "any *bona fide* employee benefit plan such as a retirement, pension, or, insurance plan, which is not a subterfuge to evade the purposes of this chapter." Defendants asserted this defense.

After analyzing the factual record, the District Court found that there was no material issue of fact on the subterfuge defense and entered judgment for the defendants. The Court of Appeals reversed, holding that the plaintiffs presented sufficient facts on the § 4(f)(2) subterfuge issue to merit a jury trial.

For two reasons, the Court should deny the petition.

The first reason for denying the petition is that this case is in an interlocutory stage. The Court of Appeals reversed the entry of a summary judgment for the defendants and remanded for trial, holding only that there are sufficient factual issues on the question of subterfuge to merit a trial. It is only in an extraordinary situation that this Court will grant certiorari in a case which has not reached final judgment. It should not do so here.

The second reason for denying the petition is because there is no conflict among the Circuits or within the Seventh Circuit on the law applicable to early retirement programs. Petitioner has misread the cases and the lower court opinion. The law is settled that a voluntary early retirement program, like any other term, condition or privilege of employment, or benefit package, is subject to

scrutiny under § 4(a)(1) of the ADEA. Its voluntariness does not immunize an age-based benefit plan from review under the ADEA.

Neither is there a conflict on the nature of the defense available under § 4(f)(2). The Court below did not hold, as petitioner asserts, that the cost of benefits must be actuarially tied to age. Rather, the Court simply held there were fact issues relating to subterfuge, after it reviewed the entire record and found a number of credibility issues in defendants' assertions about the reasons for the design of its plan. Like the concept of pretext, *see*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a review of the issue of subterfuge involves a broad inquiry into the credibility of the employer's assertions. Based on the particular facts in this record, the Court found that there were a number of factual issues precluding summary judgment. The Court held nothing more. There was no ruling on the § 4(f)(2) defense which conflicts with the decision of any other court.

STATEMENT OF FACTS

Because the petitioner presented no facts in its petition concerning the creation of the ERP, some salient facts on this issue are included here.

In November, 1981, the Illinois Supreme Court ruled that City Colleges' policy of mandatory retirement of faculty members at age 65 violated Illinois law and ordered this practice to cease. *The Board of Trustees of Community College Dist. No. 508 v. Human Rights Commission*, 88 Ill.2d 22 (1981). Four months later, City Colleges, along with the petitioner, began drafting and consideration of the Early Retirement Program (ERP) which is the subject of this suit. Plaintiffs claimed that the ERP, by abruptly cutting off benefits at age 65, continued by other means the discriminatory treatment of faculty members over 65 years old which the Illinois Supreme Court had ruled ille-

gal. Hill Dep. 15-20, 62, 68; Exh. A.

In seeking approval of the ERP from the City College Board of Trustees, the Chancellor stated that "[t]he main purpose of the [ERP] . . . is to realize financial savings by replacing older faculty members earning a higher salary with younger faculty members at the lower end of the salary schedule." Supplement to Motion for Summary Judgment, Exh. E. The Chancellor explained that there was a benefit in replacing older with younger faculty because "[y]ou have an infusion of new views, more recent training, perhaps, because you couldn't force oldtimers to go out and get more courses in the more recent courses in their own field." Shabat Dep. 36-37.

In four memos relating to the ERP, the vice-chancellor responsible for drafting it said that one of its benefits was the infusion of "new blood" into the faculty because they bring in the "newer concepts." Supplement, Exh. G-J, L; Chasau Dep. 35-36. Other officials said that the ERP, by allowing for the replacement of higher paid faculty members with newer ones, would result in "improvement in the quality of staff . . . [since] [m]any replacements would have current training and experience more response to changing technology." Exh. K. Another official warned that without an early retirement program "we will find ourselves facing a superannuated faculty at the top of the salary schedule." Exh. F.

The defendants posited two defenses to the ERP in the District Court. First, they prepared a study purporting to show that for each year after age 55 an employee is replaced by a new hire, there would be a cost savings to City Colleges. The study assumed the salary of the replacement would always be lower than the salary of the older employee. Lill Dep. Exh. A. Plaintiffs argued that this purported salary savings to the City Colleges would, at best, support a benefit package which gradually declined with age. Any such savings could not, however, support the

abrupt cut off of all benefits at age 65 in the ERP. In addition, the plaintiffs presented documents of the defendants showing that salary level was not based on age, but seniority. SA 12-14. The highest paid faculty members were not the oldest. Salary and seniority varied widely at each age level. Defendants' records in addition demonstrated that the average salary of the 65-year-old was less than that of the 60-year-old. Defendant's App. Exh. 5.

The defendants' second justification for the ERP was that the cost of providing the benefits themselves increased with age. Defendants asserted that both the cost of insurance and the lump sum payment based on sick leave accumulated rose with age. Plaintiffs demonstrated that neither of these assertions was correct.

The cost of insurance did not increase with age. Evidence established that health insurance costs decreased at age 65 because Medicare was available at that age, Lill Dep. 9-12, 26; Hill Dep. 152-55, and there was no evidence that the cost of homeowners, dental, vision, or automobile insurance increased at any age, let alone at age 65.

The record also established that the amount of sick leave accumulated did not increase with age, but was based on seniority. The employees with the greatest amount of accumulated sick leave were not the oldest, but those with the greatest seniority. SA 12-14.

The District Court did not agree with plaintiffs' arguments or consider their evidence, and entered summary judgment in favor of the defendants.

The Court for Appeals reversed, holding that there was a jury question whether the ERP was a subterfuge to evade the purposes of the ADEA. The Court pointed out, *inter alia*, that the record contradicted the defendants' assertions that the older workers were at the top of the salary schedule, that the accumulation of sick leave depended on age, as opposed to seniority, or that insurance costs rose with age. The Court also concluded that defendants' age-related cost

considerations and savings did not justify the sharp drop in benefits at age 65. In addition, the Court considered relevant the comments made by City Colleges and Union officials regarding "new blood," "oldtimers," the benefits of younger employees and defendant's past troubles with the Illinois Supreme Court as further evidence of subterfuge. The Court remanded the case for trial, holding that there remained fact issues with regard to subterfuge.

REASONS FOR DENYING THE PETITION

1. The Petition Seeks Review of an Interlocutory Order.

This Court has stated that certiorari should not be granted until a final judgment is entered unless it is "necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & R., Co.*, 148 U.S. 372, 384 (1893);*Firemen v. Bangor & Aroonstock R. Co.*, 389 U.S. 327, 328 (1967).

The Court of Appeals has not determined the case on the merits, but has only reversed a summary judgment for the defendants and remanded the case for trial. The Court stated that it "hold[s] only that the evidence submitted by the defendants in support of their motion for summary judgment does not establish that a reasonable jury could not find" that the ERP violated the ADEA. A-11-12. Given the number of factual issues involved in this case and the fact that the material reviewed thus far has been adduced only through discovery, the parties and the lower courts should be given the opportunity to have these facts and issues developed at trial. Petitioner may win this case, thereby rendering as moot the issues it raises in its petition.

There will be no extraordinary inconvenience, embarrassment or dire consequences to the petitioner if this Court allows a trial to proceed and a final judgment to be

entered before reviewing this case. At this interlocutory stage, the petition for certiorari is not ripe for review.

2. There is No Conflict Among the Circuits on the Treatment of Early Retirement Benefits.

Section 4(a)(1) flatly prohibits discrimination based on age with respect to any "compensation, terms, conditions or privileges of employment." This provision has been applied to a wide variety of benefits to employees, including retirement and pension benefits. This Court has interpreted 4(a)(1) to "broadly prohibit[ ] arbitrary age discrimination in the work place based on age." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985). The fact that a benefit such as an early retirement program is purely voluntary with the employee does not remove its coverage from § 4(a)(1).

In *Arizona Governing Committee for Tax Deferred Annuity & Deferred Plans v. Norris*, 463 U.S. 1073 (1983), this Court found a voluntary pension and profit sharing plan to be covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The fact that particicpation was voluntary was irrelevant since, according to the Court, Title VII forbids all discrimination concerning compensation, terms, conditions, or privileges of employment, "not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." *Id.* at 1081-82, n.10. The Court held that "retirement benefits constitute a form of 'compensation'" under 42 U.S.C. § 2000e-a(a)(1) which, like its counterpart in the ADEA, § 4(a)(1), prohibits discrimination with respect to "compensation, terms, conditions or privileges of employment."

This Court similarly held in *Hishon v. King & Spalding*, 104 S.Ct. 2229 (1984), that retirement benefits were a term, condition and privilege of employment. This concept of voluntary benefits was directly applied to the ADEA by

this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), in which the Court, quoting from *Hishon*, stated that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all."

The Seventh Circuit adopted this analysis below, holding that it is illegal for the defendants to have an early retirement program which cuts off benefits at age 65. The Court concluded that the ERP is discriminatory because it provides for two benefit levels, "a munificent one for workers 55 to 64 and a chintzy one for workers 65 to 69." A-11. The Seventh Circuit earlier in *Henn v. National Geographic*, 819 F. 2d 824, 827 (7th Cir. 1987), held that "[an] employee excluded from [an] . . . early retirement plan . . . or treated adversely under it . . . has stated a claim of discrimination."

Each Circuit that has considered early retirement or severance benefits paid to older employees has held that agebased distinctions made in such benefits are subject to scrutiny under the ADEA. Judge Friendly in *Cipriano v. Board of Education of Cty. School Dist.*, 785 F. 2d 51 (2d Cir. 1986), found a voluntary early retirement program with gradually diminishing benefits with age to be subject to ADEA review.

The petitioner claims that the Eighth Circuit's decision in *Patterson v. Independent School Dist. # 709*, 742 F. 2d 465 (8th Cir. 1984), is in conflict with *Cipriano*. However, the Eighth Circuit did find that an early retirement program was actionable under §4(a)(1) and then reviewed the §4(f)(2) defense. Other early retirement and severance benefits conditioned or limited by age considerations have been reviewed under the ADEA. EEOC v. *Westinghouse Electric Corp.*, 725 F. 2d 211, 224 (3d Cir. 1983), *cert. denied*, 105 S.Ct. 92 (1984); *EEOC v. Bordens, Inc.*, 724 F.2d 1390 (9th Cir. 1984); *Alford v. City of Lubbock*, 644 F.

2d 1263 (5th Cir. 1982), *cert. denied*, 456 U.S. 975 (1982).

Neither does *Britt v. E.I. DuPont de Nemours & Co., Inc.*, 768 F. 2d 593 (4th Cir. 1985), create a conflict. In Britt, the Court stated that it was not faced with an early retirement program such as in *Patterson*, but recognized that such a benefit program was subject to ADEA review. n. 4 at 595. *Britt's* analysis and holdings in no way allow an employer free rein to create a voluntary early retirement program with benefits discriminatorily tied to age. In *Britt*, all employees, no matter what their age, were offered severance pay, but those who were also eligible for a pension had to agree to defer the receipt of the pension if they wanted the severance pay. The pension- eligible plaintiff, however, wanted both the severance and the right to immediate receipt of his pension. The Court held that the plaintiff did not state a claim of age discrimination because employees old and young were being treated the same–both were offered identically tailored severance benefits. Thus, in *Britt*, there was no discrimination.

There is no conflict among the Circuits that age-based voluntary early retirement benefits may be considered under the ADEA.

3. There Is No Conflict Among The Circuits On The Nature of the Defense Under Section 4(f)(2).

Petitioner tries to create a false conflict among the Circuits by mischaracterizing the opinion of the Seventh Circuit. According to petitioner, the Seventh Circuit held that a § 4(f)(2) defense requires a showing that the business reasons for the retirement incentives are related to cost of the incentive benefits.

This is not what the Court held. The Seventh Circuit held that where the employer asserts cost savings as a business justification for an age-discriminatory incentive program, then the burden shifts to the employer to demonstrate a high correlation between the age of the employee

and the costs to the employer. The Court stated that "where, as in the present case, the employer uses age–not cost, or years of service, or salary– as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost . . . Otherwise, the inference of age discrimination will be strong– certainly strong enough to defeat a motion for summary judgment " . . . ." A-8. Contrary to petitioner's argument, the Seventh Circuit's opinion, as properly stated, is consistent with the Second Circuit's opinion in *Cipriano*.

The Court nowhere stated that an employer must show a direct relationship between the benefits and their costs or lose its ADEA case. The *defendants* raised this issue. They claimed that because older employees had higher salaries than younger employees, City Colleges would save money by inducing the older employees to leave the workforce and replace them with lower-paid younger employees. But this argument is contradicted by the record. Age has nothing to do with level of salary. At any given age, employees' salaries varied widely, as did their seniority and accumulated sick leave. Plaintiffs also demonstrated that the average salary of the 65-year-old was less than that of the 60-year-old, thereby raising serious doubts about the defendants' assertions that older employees were the highest paid.

The Seventh Circuit's decision on the issue of subterfuge was based on a review of the entire record and is not limited to any cost issue. The Court relied on other facts which undermined the defendant's arguments. Among the facts that justified reversal of the summary judgment were the following: that, although the defendants claimed that insurance costs rose with age, there was no evidence presented on the issue, except that health insurance costs actually declined with age; that, even if the employer could show that higher salary was tied to age, there was no justification for the sharp drop in benefits

at age 65; that the record contradicted the argument that the older employees had more accumulated sick leave; and that the defendants, only months after being ordered to cease an illegal program of mandatory retirement, stated that they were designing the ERP to obtain "new blood" and to replace older with younger employees because of the stereotyped generalization that the "oldtimers" lacked motivation and training. These matters created a fact issue on whether defendants created the ERP as a "subterfuge under the purposes of" the ADEA. § 4(f)(2).

The petitioner has mischaracterized the fact-bound Seventh Circuit opinion and is seeking to create issues and conflicts where none exist.

CONCLUSION

Respondent respectfully requests the Court to deny the petition for writ of certiorari.

Respectfully submitted,

Stephen G. Seliger